

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF TEXAS
MARSHALL DIVISION

NETLIST, INC.

Plaintiff,

v.

SAMSUNG ELECTRONICS CO., LTD.,
SAMSUNG ELECTRONICS AMERICA, INC.
and SAMSUNG SEMICONDUCTOR, INC.,

Defendants.

Civil Case No. 2:21cv463-JRG

JURY TRIAL DEMANDED

**SAMSUNG'S SUR-REPLY TO NETLIST'S PARTIAL MOTION FOR
SUMMARY JUDGMENT ON SAMSUNG'S AFFIRMATIVE DEFENSES (Dkt. 199)**



TABLE OF AUTHORITIES

Page(s)

Cases

<i>Arctic Cat v. Bombardier Recreational Prods. Inc.</i> , 876 F.3d 1350 (Fed. Cir. 2017).....	1, 2
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[REDACTED]

Samsung notified Netlist in its October 12, 2022 letter of specific products that were unmarked with specific Netlist patents. That is all that is necessary to satisfy *Arctic Cat*’s “low bar” to put Netlist on notice that Netlist and its authorized licensees have failed to mark. *Arctic Cat v. Bombardier Recreational Prods. Inc.*, 876 F.3d 1350, 1368 (Fed. Cir. 2017).

First, Samsung’s October 12, 2022 letter expressly states that it is providing notice of unmarked products that should be marked with the patents-in-suit, including the ’060 and ’160 patents. Dkt. No. 199-4 at 1 [REDACTED]

[REDACTED]

[REDACTED]

[REDACTED]). Second, Samsung’s letter expressly states that [REDACTED]

[REDACTED]

[REDACTED] *Id.* at 2.

Such notice satisfied Samsung’s obligation to put Netlist on notice of its failure to mark. The *Arctic Cat* requirement is a notice requirement, “a burden of production, not one of persuasion or proof.” *Arctic Cat*, 876 F.3d at 1368. *Arctic Cat* is clear that the entire purpose of its notice requirement is to define the universe of **products** at issue. “Permitting infringers to allege failure to mark without identifying any products could lead to a large scale fishing expedition and gamesmanship.” *Id.* Samsung’s letter unquestionably identifies the unmarked products at issue. It is simply not credible for Netlist to assert that Samsung’s letter identifying “the HBM Patents” (a term Netlist itself used to describe the ’060 and ’160 patents), *see, e.g.*, Dkt. No. 76 at 26, and identifying SK hynix’s HBM products, did not provide Netlist with *Arctic Cat* notice.

Netlist would have this court treat the *Arctic Cat* notice requirement as a form of infringement contentions, in which Samsung has the burden to map specific patents to specific Netlist or licensee products in order to meet Samsung's burden to identify unmarked products. However, in its Motion for Summary Judgment on this issue, and in its Reply, Netlist cites ***absolutely no authority to support this position***. Dkt. No. 199; Dkt. No. 306. In contrast, Samsung has identified multiple cases detailing that the only requirement for satisfying *Arctic Cat* is that Samsung identify unmarked products. Dkt. No. 254 at 5-6.

Under *Arctic Cat*, the defendant has only the burden to narrow the universe of unmarked products so the burden on the plaintiff is limited to a discrete set of products. "Once the alleged infringer meets its burden of production, however, the patentee bears the burden to prove the products identified do not practice the patented invention." *Arctic Cat*, 876 F.3d at 1368. Samsung met its burden, but Netlist dropped the ball. Netlist chose to ignore the notice of unmarked products Samsung provided, and offered no evidence that these products need not have been marked. The Court, therefore, should deny Netlist's Motion, Dkt. No. 199, as to the marking issue, and should grant Samsung's Motion for Summary Judgment of No Pre-suit Damages, Dkt. 198.

Date: March 3, 2023

Respectfully submitted,

/s/ Lauren A. Degnan

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CERTIFICATE OF SERVICE

I hereby certify that a true and correct copy of the foregoing document was filed electronically in compliance with Local Rule CV-5 on March 3, 2023. As of this date, all counsel of record have consented to electronic service and are being served with a copy of this document through the Court's CM/ECF system under Local Rule CV-5(a)(3)(A) and by electronic mail.

/s/ Lauren A. Degnan

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